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July 21, 1960
Opinion No. 60-50

REQUESTED BY: Honorable David S. Wine, State Senator
Honorable H. S. Corbett, State Senator
Honorable Harry Ackerman, County Attorney,
Pima County.

OPINION BY: WADE CHURCH, The Attorney General.

QUESTION: Are the provisions of Senate Bill No.
18, Laws 1960, Chapter 127, providing
for the payment of nonresident tuition
fees constitutional?

CONCLUSION: Yes.

The Attorney General is requested to determine whether newly enacted A.R.S. §§ 15-302.01 and 15-547.01 relating to the payment of school tuition by nonresidents of the state are violative of the free school provision of the State Constitution.

These sections were enacted as §§ 18 and 19 of Senate Bill 18, Laws 1960, Chapter 127, and are identical except that the former pertains to common schools and the latter to high schools.

In order to clarify the discussion, A.R.S. § 15-302.01 is set forth as follows:

"§ 15-302.01. Admission to common school of pupils
not residents of this state; tuition

A. Children of nonresidents of the state may be admitted to attend common school upon payment of tuition fees to be fixed by the governing board of the common school district. Before admitting such children, the board shall demand of each such child payment of tuition fees equal to the average per capita cost of the common school for the preceding school year, plus an amount for capital outlay not exceeding one hundred dollars per pupil per year, or a proportionate amount for tuition and capital outlay based on the actual attendance of the pupil. The fees required under the provisions of this section shall be paid to the district by the parent or guardian of the pupil unless the parent or guardian shows to the satisfaction of the board his inability to pay all or any part of the fees, in which case the board shall not be required to collect such fees for such pupil. If the board waives all or any part of the tuition fees or the amount for capital outlay, the amount paid by the parent or guardian of the pupil shall be allocated on the basis of first paying for capital outlay as prescribed in this section. The remainder shall be allocated towards tuition fees.

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B. For the purpose of this section, a nonresident is defined as a person who has lived in this state less than one year or who has not purchased a home which is occupied by him as his residence prior to the enrollment of his child in school, or who has not filed with the district board a manifestation, under oath, of his intent to be a resident for at least one year of the state of Arizona, on a form which shall be prescribed and furnished to each district by the state superintendent of public instruction.

C. All monies collected by the district under the provisions of this section shall be deposited in the district fund and shall be used only for the purpose of helping to defray the expenses of the district."

The constitutional provision affecting the question is that part of the Arizona Constitution, Article 11, Section 6, which provides:

"The Legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years."

The statute and the constitutional provision above quoted must be construed together since they affect the obligation of the taxpaying residents to provide free public school facilities for nonresidents who are not taxpayers. The question is discussed in 47 American Jurisprudence, Schools, § 151, p. 406, as follows:

"Generally, the statutes establishing free public schools provide for defraying the expense of maintaining the schools in a particular municipality or district by taxing the inhabitants thereof. The policy of these statutes is to impose upon the taxpayers of each district the expense of educating the children of its inhabitants. As a general rule, therefore, the free school privileges of a district, town or city are open only to children, otherwise eligible, who are bona fide residents of that district, town, or city.

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The privilege accorded to the children of a state to attend the public schools maintained at the expense of the state is not a privilege or immunity appertaining to the child as a citizen of the United States within the Federal Constitution, and no person can demand admission as a pupil in any school merely because he is a citizen of the United States."

Contemporaneously with the adoption of the Arizona Constitution, and since that time, statutes have been enacted by the Legislature requiring non-resident parents to pay school tuition for their children. For illustration, Revised Statutes of Arizona 1913, § 2768, provided, in part, as follows:

"They (boards of trustees) may also admit the children of nonresidents of the state, upon payment of a reasonable tuition fee to be fixed by the board of trustees."

The Revised Code of 1928, § 1030, provided, in part, as follows:

"The children of nonresidents of the state may be admitted upon the payment of reasonable tuition fixed by the board."

The Arizona Revised Statutes 1956, § 15-302, provided, in part, as follows:

"Children of nonresidents of the state may be admitted on payment of a reasonable tuition fixed by the board."

Thus, it is observed that for approximately half a century the laws enacted by the Legislature of this state have provided that nonresident parents are required in some manner to pay tuition for the privilege of their children attending school.

The question of the obligation of the state and its taxpayers to furnish the facilities of public schools to children of parents who are nonresidents of the state, but who are temporarily in the state, has been previously considered by Attorneys General in the following opinions:

Opinion No. 54-32, rendered February 23, 1954;
Opinion No. 54-168, rendered December 14, 1954;
Opinion No. 56-97, rendered May 4, 1956;
Opinion No. 59-146, rendered October 7, 1959.

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These opinions have consistently upheld the constitutionality of legislation requiring the payment of school tuition for children of nonresidents.

The Attorney General under the Arizona Constitution is classified as an executive officer of the state government and therefore, he exercises no legislative or judicial authority. The Attorney General cannot make a conclusive declaration as to the constitutionality or unconstitutionality of a law. That authority is conferred by the Constitution solely upon the judicial branch of the government and, in finality, upon the Supreme Court of the State.

The Attorney General, as an executive officer of state government, is not concerned with the wisdom or purpose of legislative enactments, nor is he concerned in his official capacity with the burden such enactments cast upon those who are affected thereby if they do not transgress constitutional limitations.

The Attorney General does conclude, as a result of applicable law, and former opinions rendered by Attorneys General, that the laws here involved relating to school tuition for children of nonresident parents are constitutional.

WADE CHURCH
The Attorney General

Leslie C. Hardy
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